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Public Comment Processing
Attention: 1018-AT50
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

RE: Comments on Environmental Assessment on Proposed Rule Amending Regulations
Implementing Section 7 of the Endangered Species Act

Dear Sir or Madam:

The Attorney General of the State of California submits the following comments, in his independent capacity as representative of the people of the State,¹ on the Environmental Assessment (EA) for the proposed regulations implementing section 7 of the federal Endangered Species Act (ESA), 16 U.S.C. § 1536. 73 Fed. Reg. 47868 (Aug. 15, 2008). We previously submitted comments on the proposed regulations, which, inter alia, raise serious questions about the environmental impacts of these rule changes. Those issues are not addressed in the EA. In our previous comment letter, we set forth our opinion that the proposed regulations violate the ESA. Now, the Department of Interior (Department), by failing to address basic, reasonably foreseeable impacts of the proposed regulations and concluding that the proposed regulations will have no environmental impacts whatsoever, also has violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4232 et seq.

At the outset, the Attorney General notes that, according to newspaper accounts, the Department received over 300,000 public comments on the proposed regulations by the October 14, 2008 deadline. According to these news reports, the Department "reviewed" the 300,000-plus public comments in only three days, literally allowing only minutes of time to review and respond to the each comment, including detailed evaluations of the proposed regulations such as the Attorney General's 17-page letter. *See, e.g.*, Dina Cappiello, Associated Press, Wednesday, October 22, 2008.

If these reports are accurate, it appears that the Department is flouting the public review

¹ *See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). This letter does not purport to reflect the views or opinions of any other State of California official, agency or entity.

process and has already predetermined the result. The Department, almost certainly, will issue a Finding of No Significant Impact, will not complete an Environmental Impact Statement (EIS), and will adopt the regulations in their current form, based on a truncated public review and comment period that borders on the absurd. As for the EA, the Department now provides a mere ten days for public review and comment. Providing ten days for public review and comment on an issue of this importance and complexity reflects a fundamental disregard for meaningful scientific and public review and government process. The three day review of hundreds of thousands of public comments received on the proposed regulations and the ten day period now provided for comments on the EA is a cynical attempt to limit public review of a decision apparently already reached by an agency plainly disinterested in any meaningful public discourse on this issue.

What follows are the Attorney General's specific comments on the EA, severely limited by the inadequate time for review. As a result our comments are neither fully developed nor exhaustive.

I. The EA's Analysis and Conclusions Are Contrary to NEPA and Are Therefore Unlawful

NEPA has a two-fold purpose. First, NEPA is designed to ensure federal agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts" of their proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Second, NEPA "also guarantees that the relevant information will be made available to the larger [public] audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.*; see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (NEPA focuses both "Government and public attention on the environmental effects of proposed agency action"). Accordingly, NEPA requires a federal agency "to the fullest extent possible," to prepare "a detailed statement on . . . the environmental impact" of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i).

"A threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). An agency may elect to prepare an EA "[a]s a preliminary step, . . . to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS." *Id.*, citing 40 C.F.R. § 1508.9(a). An EA must "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). In so doing, an EA must "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). "Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process." *Metcalf v. Daley*, 214 F.3d

1135, 1143 (9th Cir. 2000).

If “substantial questions are raised” as to whether a proposed federal agency action “may have a significant effect” on the environment, then the agency *must* prepare an EIS to evaluate this effect. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006); see also *Blue Mts. Biodiversity Project*, 161 F.3d at 1212. “This is a low standard.” *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 562. Thus, in challenging a federal agency’s decision not to prepare an EIS, a “plaintiff need not show that significant effects *will in fact occur*,” rather; a plaintiff need only raise “substantial questions whether a project may have a significant effect.” *Id.*, emphasis in original.

An agency’s decision not to prepare an EIS is reviewed under the arbitrary and capricious standard of review. *Blue Mts. Biodiversity Project*, 161 F.3d at 1211. Under this standard of review, such decision will be found arbitrary and capricious if the agency has failed to “take a hard look at the environmental consequences” of its action and the agency’s analysis is not “based on a consideration of the relevant factors.” *Metcalf*, 214 F.3d at 1141. “[T]he comprehensive ‘hard look’ . . . must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Id.* at 1142.

In addition, “[a]n agency’s decision not to prepare an EIS will be considered unreasonable,” and therefore arbitrary and capricious, “if the agency fails to supply a convincing statement of reasons why potential effects are insignificant.” *Blue Mts. Biodiversity Project*, 161 F.3d at 1211, quoting *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Id.* at 1212.

Here, for the reasons described below, the analysis and conclusions in the Services’ EA on the proposed regulations are not objective, reasonable or convincing and do not appear to be made in good faith. Instead, the EA is the epitome of “form over substance” and is plainly a “subterfuge designed to rationalize a decision already made.” *Metcalf*, 214 F.3d at 1142.

A. The EA Does Not Take The Requisite “Hard Look” at the Proposed Rules’ Environmental Impacts

The Services’ EA purports to “examine whether the proposed regulatory changes will have any direct, indirect, or cumulative impacts on the quality of the human environment.” EA at 13. However, the document lacks any analysis whatsoever of the impacts associated with the proposed rule. Instead, the EA concludes, without supporting evidence or analysis, that the proposed rule will have *no* environmental effects. See e.g., *id.* at 16-17. Without exception, each of the sections of the EA concludes that the proposed changes “will not result in any significant environmental consequences.” *Id.* at 16, 18, 20, 23. Similarly, the EA makes the bold statement that “while some may believe that one or more of the proposed regulatory

changes will somehow result in substantive changes in the level of species protection, the Services do not believe this is the case.” *Id.* at 13. Such conclusions, without any evidentiary support, do not satisfy NEPA. *Oregon Natural Res. Council v. United States Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006) (holding that conclusory statements are insufficient to show that agency has taken a hard look at the action’s effects); *Blue Mts. Biodiversity Project*, 161 F.3d at 1214 (EA must contain data and references to material in support of its conclusions).

B. The Proposed Regulations Will Have Numerous Potentially Significant Environmental Impacts on Species and Habitat That Require Further Analysis in An EIS

In evaluating the “significance” of an impact, for purposes of determining whether an EIS is required, federal agencies must consider, inter alia: (1) “[t]he degree to which the effects . . . are likely to be highly controversial”; (2) “[t]he degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks”; (3) “[t]he degree to which the action may establish a precedent for actions with significant effects or represents a decision in principle about a future consideration”; (4) whether the action may result in significant cumulative effects; and (5) “[t]he degree to which the action may adversely affect an endangered or threatened species or its critical habitat.” 40 C.F.R. § 1508.27(b).

The proposed regulations meet all of these criteria. Specifically: (1) the proposed regulations are highly controversial because they are the most significant substantive changes to the federal ESA’s implementing regulations in over 20 years, and they received over 300,000 public comments; (2) in limiting the number and extent of section 7 consultations under the federal ESA, particularly with respect to federal actions with significant greenhouse gas emissions, the proposed regulations will involve unique or unknown risks to listed species and their habitat; (3) the proposed regulations will establish a negative precedent for evaluating and mitigating the adverse effects of federal agency actions under the federal ESA; (4) the regulations will result in significant cumulative effects on listed species and their habitat; and (5) the regulations will adversely affect listed species and designated critical habitat.

Indeed, the amount of public controversy concerning the nature and effect of the proposed regulations alone requires preparation of an EIS. A federal action is considered controversial where, as here, “a substantial dispute exists as to [its] size, nature or effect.” *Foundation for N. American Wild Sheep v. U.S. Dept. of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982). In such circumstances, an EIS is required. See *id.* (finding substantial dispute and requiring EIS where, as here, the agency “received numerous responses from conservationists, biologists and other knowledgeable individuals, all highly critical of the EA and all disputing [its] conclusion” of no significant effect). Therefore, the conclusion is inescapable that the Services must prepare an EIS.

Below the Attorney General provides some illustrative specific examples of the types of

significant direct, indirect and cumulative environmental effects the proposed regulations are likely to have.

1. Significant Environmental Impact of the Proposed Rules' Exemption of Certain Types of Federal Actions From Section 7

The proposed regulations would exempt from ESA section 7 federal agency actions the direct and indirect effects of which “are not anticipated to result in take” and which meet one or more of several other specified criteria. Specifically, consultation is not required if the federal action agency determines that: (1) the action will have “no effect on a listed species or critical habitat”; (2) the action is “an insignificant contributor to any effects on a listed species or critical habitat”; or (3) if the effects of the action on listed species or critical habitat “are not capable of being meaningfully identified or detected,” are “wholly beneficial” or are “such that the potential risk of jeopardy to the listed species or adverse modification or destruction of critical habitat is remote.” Proposed 50 C.F.R. § 403.03(b). Further, the rules propose the narrowly define the types of indirect and cumulative effects that a federal agency must consider when determining whether an action meets the above criteria. See Proposed 50 C.F.R. § 402.02, discussed further in section II.B.3 below.

Under ESA section 7(a)(2), each federal agency “*shall insure*” that “*any action*” that is authorized, funded or otherwise carried out by that agency is not likely to jeopardize listed species *or* result in the adverse modification or destruction of designated critical habitat. 16 U.S.C. § 1536(a)(2). As we discussed in our comments on the proposed regulations, under the plain language of the statute, the Fish and Wildlife Service and the National Marine Fisheries Service do not have authority to exempt certain types of federal agency actions from section 7 wholesale. It is not for the Services to determine that there is “little value” in requiring consultation on certain types of federal agency actions because such consultation is “unnecessary” or not “an efficient use of limited resources.” 73 FR 47871. Section 7 “applies to *every* discretionary agency action regardless of the expense or burden its application might impose.” *National Assn. of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2537 (2005), emphasis added. In other words, “section 7 consultation is not optional.” *National Wildlife Fedn. v. NMFS*, 524 F.3d 917, 929 (9th Cir. 2008).

Despite these section 7 requirements, the proposed regulations create consultation “options” which, in certain circumstances, allow federal agencies altogether to avoid consulting with the Services regarding the effects of their actions on listed species and critical habitat. That change has potentially profound environmental consequences that must be evaluated in an EIS. Indeed, the EA admits that this new provision is likely to reduce the number of consultations that will occur, but dismisses this potential effect by stating that “there is no basis to quantify the scope of that reduction” and that this will allow the Services “to better focus their limited resources.” EA at 19-20. These are not sufficient reasons for failing to evaluate this clearly significant effect. The courts have warned that “general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive

information could not be provided.” *Blue Mts. Biodiversity Project*, 161 F.3d at 1213, quoting *Neighbors of Cuddy Mtn. v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). Here, the EA provides no such justification for its failure to provide more definitive information.

Furthermore, the proposed regulations would exempt some federal actions that may result in jeopardy to listed species or adverse modification or destruction of critical habitat, also contrary to the substantive requirements of section 7. In determining whether an agency action would be exempt from consultation, the proposed regulations would require federal agencies to consider only the direct and indirect effects of their actions (as newly, narrowly defined), but not the cumulative effects, and to find only that the actions are not “anticipated” to result in take. Also, a project would be exempt if a federal agency finds that the risk of jeopardy – not simply the risk of adverse effects – is “remote.”

These vague and imprecise standards, even if properly applied, could exempt projects that in fact will result in “take,” which in turn could jeopardize listed species and/or adversely modify or destroy critical habitat, particularly for highly imperiled species for which any additional, unmitigated impacts are intolerable. (The EA’s analysis inappropriately assumes, however, that inexpert federal agencies will properly interpret and apply these vague exemption criteria absent the oversight of Service scientists. If the criteria are not properly applied – a very likely occurrence – even greater adverse impacts to listed species and critical habitat will result. See further discussion in section II.B.2 below.) These are real, concrete, potential environmental impacts, and they must be addressed in a full-scale EIS.

In addition, the proposed regulations could exempt projects that, although potentially not resulting in take, nevertheless may result in adverse modification or destruction of critical habitat. Because critical habitat must include areas that are not currently occupied by the species but which are essential to the species’ recovery, actions that might not take listed species still could result in the adverse modification or destruction of their critical habitat. See 16 U.S.C. §§ 1532(3), (5)(A); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-70. Again, these potential impacts are significant, and under NEPA, require review in an EIS.

Perhaps more importantly, under the Services’ proposed approach of exempting projects with supposedly “insignificant,” “remote” or difficult to determine effects, “a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills that the ESA seeks to prevent.” *National Wildlife Fedn*, 524 F.3d at 930. These potential impacts also must be evaluated in an EIS.

2. Significant Environmental Impact of the Proposed Rules’ Elimination of Sound Science and Threshold Service Review

New section 402.03(b) also would allow federal agencies (along with any private project

proponents) *unilaterally* to determine, without the Services' review or concurrence, whether their actions are exempt from consultation under this provision. Such determinations could be made without any site-specific analysis or documentation, and without any expert biological review and input, *even if* listed species and critical habitat may be present in the action area. Thus, the consequence of the proposed rules is to eliminate the critical scientific review and oversight that exists under current law and to allow self-consultation by federal agency project proponents.² This action – the removal of scientific oversight from the process of evaluating the impact of federal agency actions on threatened and endangered species and their habitat – by definition may have a significant environmental impact that requires full evaluation in an EIS.

Despite the Services' stated belief that "federal action agencies will err on the side of caution" in making the exemption determinations in section 402.03(b) and "have now had decades of experience with section 7" that will lead them to make the proper decisions (73 FR 47871), the reality is that, absent the Services' expert review and input, federal action agencies are not qualified to determine whether a project would result in "no take" or would meet the other criteria of proposed section 402.03(b). Only the Services have qualified personnel with the relevant biological expertise to make these determinations. This removal of expert scientific agency oversight from the consultation process will have significant environmental effects that must be evaluated in an EIS.

In addition, contrary to the statements in the Federal Register notice and EA, as the project proponents, federal action agencies are interested parties that will have every incentive to find that their activities satisfy the criteria of proposed section 402.03(b). Unlike the ESA, the statutory missions of federal agencies do not normally place first priority on protecting imperiled species and their habitat, but rather direct agencies to undertake a host of other functions that may adversely affect species and habitat. *See, e.g.*, National Forest Management Act, Federal Land and Policy Management Act, Federal Power Act; see also *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1235 (2008) (Noonan, J. concurring) (U.S. Forest Service was motivated to approve timber sales on national forest lands in order to generate increased agency funds). The ESA, by contrast, reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978). By allowing federal action agencies unilaterally to determine whether an action is exempt from section 7 absent a requirement for site-specific analysis and documentation and the

² Under current law, in contrast to the proposed rules, each federal action agency must request from the relevant Service a list of any listed species and critical habitat that may be present in the action area. See 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If the Service advises that listed species or critical habitat may be present, then further analysis and consultation (either formal or informal) with the Service is required. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(d)(2), 402.13, 402.14. Only if the Service advises that *no* listed species or critical habitat may be present may the federal action agency make a "no effect" determination. 50 C.F.R. § 402.12(d)(1).

Service's review and concurrence, the proposed regulations would have precisely the opposite effect.

Moreover, the proposed rules provide no objective, scientific criteria or standards for a federal agency to determine whether its action meets the vague and open-ended criteria of proposed 50 C.F.R. section 403.03(b). The rules also do not contain any requirement for federal agencies to document their exemption determinations, so it will be impossible for the Services or the public to determine whether, when and how these determinations are being made and if such determinations are appropriate. Projects will simply proceed based on federal agencies' undisclosed, internal decisions that the projects are exempt from section 7. As a result, the Services' scientists and the public will be foreclosed from the process, and the regulations will shield from review potentially major impacts on listed species and critical habitat. Even assuming that proper application of the criteria "could never amount to an adverse impact to listed species" (73 FR 47871) (which, as we have pointed out above, is not the case), it necessarily follows that *improper* application of the criteria, without site-specific review and documentation and the Service's written concurrence, could well result in serious adverse effects on listed species and critical habitat, and could even lead to the extinction of some highly imperiled species. These environmental consequences must be evaluated in an EIS.

3. Significant Environmental Impact of the Proposed Rules' Provision for Arbitrary Early Termination of Informal Consultation

For those federal agency actions and effects that would remain subject to the section 7 consultation requirements, the proposed regulations would allow federal action agencies to terminate the informal consultation process prematurely and arbitrarily if the Service has not provided a written concurrence with a federal agency's determination that its action is "not likely to adversely affect" listed species or critical habitat within sixty days of the date on which the federal agency requests such a determination. Proposed 50 C.F.R. §§ 402.13(b), 402.14(b)(1). The agency may then proceed with the project without further review. However, there are myriad reasons why the Services may not be able to provide a written determination within sixty days. Such failure says nothing about the lack of environmental effects of an agency action on species and habitat. Indeed, allowing a project to proceed under such circumstances potentially could result in the extirpation of an entire species. Surely, this potential alone requires evaluation in an EIS.

The EA itself acknowledges that some informal consultations will be terminated early under this new provision. EA at 22. The EA, however, dismisses this potentially significant effect by erroneously assuming that federal agencies will only utilize the informal consultation process for actions that are not likely to "take" listed species. *Id.* at 23-24. There is no legal or factual basis for this assumption, as the informal consultation process currently is used for many types of actions with a broad range of effects and is not limited to federal actions that will not result in take. The proposed regulations also contain no such limitation. The EA implicitly acknowledges the possibility that federal agencies could and might utilize informal consultation

for projects that will or may result in take by stating that “an action agency is *unlikely* to initiate a request for informal consultation if it appears that the project might result in take.” *Id.* at 24.³

Moreover, even if it is true that federal agencies are only likely to utilize the informal consultation procedures for actions that in fact are not likely to “take” a listed species (and therefore which are not likely to cause jeopardy), agencies still must consider whether their actions may adversely modify or destroy critical habitat. For reasons stated in section II.B.1 above, adverse modification of critical habitat can occur in some circumstances even absent any take. Such effects must be analyzed in an EIS.

4. Significant Environmental Impact of the Proposed Rules’ Limitations on the Definition of Indirect and Cumulative Effects

The proposed regulations also would limit the type and extent of the indirect and cumulative effects that could be considered when federal action agencies or the Services are: (1) determining whether a federal agency action is exempt from section 7 under new section 402.03(b); (2) preparing biological assessments; (3) determining whether an action is not likely to adversely affect listed species or critical habitat during informal consultation; (4) preparing biological opinions during formal consultation; (5) determining whether to reinstate consultation; and (6) undertaking other consultation activities. 50 C.F.R. §§ 402.12, 402.13, 402.14, 402.16.

Specifically, federal agencies and the Services would only need to consider indirect effects for which the action is the “essential cause” and that are “reasonably certain to occur” based on “clear and substantial information.” Proposed 50 C.F.R. § 402.02. The Federal Register notice states that “our intent is to clarify that there must be a close causal connection between the action under consultation and the effect that is being evaluated. . . . [I]f an effect would occur regardless of the action, then it is not appropriate to require the action agency to consider it an effect of the action.” 73 FR 47870.⁴ The requirement that effects be “reasonably certain to occur” based on “clear and substantial information” is intended “to make clear that the effect cannot be just speculative and that it must be more than just likely to occur.” *Id.* In addition, “cumulative effects” would be defined to exclude “future Federal activities that are

³ In addition, the EA erroneously assumes that federal action agencies are qualified to make the determination whether an action is likely to result in take absent the Services’ concurrence, a factor we discuss further in section II.B.2 above.

⁴ Indeed, the proposed rules purport to require, in some instances, even “more than a technical ‘but for’ connection,” and to necessitate a showing that the action is “intended to bring about the future effects,” a standard that is almost impossible to meet. *Id.*

physically located within the action area” of the agency action at issue.⁵ Proposed 50 C.F.R. § 402.02.

Section 7 of the ESA directs federal agencies to “insure,” without limitation, that each federal agency action is not likely to jeopardize any listed species or adversely modify or destroy critical habitat. 16 U.S.C. § 1536(a)(2). This substantive statutory mandate simply cannot be met if federal action agencies and the Services need only consider the limited types of indirect and cumulative project effects as proposed in these regulations and must document the occurrence of these effects with “clear and substantial information.” Additionally, the ESA itself directs the Services to consider, without limitation, “how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). Because the proposed regulations will limit the type, scope and extent of the effects that must be considered and mitigated during the section 7 consultation process, contrary to the broad statutory mandate of the ESA, these environmental effects must be evaluated in an EIS.

The EA claims that the regulations’ proposed limitations on the types of effects that could be considered under section 7 would not have any significant environmental effects because these changes would simply codify the Services’ existing policy and practice. EA at 17-18. This claim simply is not credible. Even if the claim were true (which we believe it is not), regulations have the force of law, while policy and practice do not. Thus, if adopted, the proposed regulations would implement a significant change in existing law which must be analyzed in an EIS.

5. Significant Environmental Impact of the Proposed Rules’ Elimination of the Requirement to Consider the Effects of Increased Greenhouse Gas Emissions and Other Effects on Species and Habitat

Current scientific information has established that global warming already is having serious effects on species’ survival and recovery and that these effects are only likely to increase substantially in the future. The proposed rules would eliminate the consultation and concurrence requirements for projects whose effects are supposedly “an insignificant contributor” to adverse impacts on listed species and habitat, are “incapable of being meaningfully evaluated” or pose only a “remote” risk. Thus, federal agencies would be able to simply sweep the effects of increased greenhouse gas emissions from their projects – as well as a host of other types of project effects – off the table entirely by concluding that such effects are “insignificant,” “incapable of being meaningfully evaluated” or pose only a “remote” risk. See 73 FR 47870. This could be done absent site-specific analysis, documentation and scientific review and oversight. As such, the proposed new exemptions could have devastating and irreversible effects

⁵ We recognize that the exemption of other federal agency actions from the definition of cumulative effects “is not a new concept” (73 FR 47869); however, the proposed regulations would expand on this concept which is inconsistent with section 7.

on imperiled species and habitat. As the science of global warming and its impact on species and habitat continues to develop, it is essential that federal action agencies not be permitted to foreclose input from the federal biological agencies. The review of these expert agencies will bring the most current knowledge of these issues to bear on critical projects.

Similarly, the proposed requirements that the federal agency action being evaluated must be an “essential” cause of the effect, and that the effect must be reasonably certain to occur based on “clear and substantial information,” are both specifically intended to eliminate greenhouse gas emissions (as well as other effects) from the range of effects that could be considered under section 7 of the ESA. See 73 FR 47870. It is true that no single source of greenhouse gas emissions can be deemed *the* cause of the global warming or its effects on any given species. This does *not* mean, however, that the effects of large projects which indirectly or cumulatively contribute to or exacerbate global warming and its adverse impacts on species and habitat should not be properly evaluated and avoided or mitigated.

Carving these impacts out of the ESA through the proposed regulations could have a major impact on species’ survival. Unequivocally, these are potentially significant effects that must be evaluated in an EIS.

6. Significant Environmental Impact of the Proposed Rules’ Segmentation of the Analysis of Federal Agency Actions

Additionally, the proposed regulations would allow federal action agencies and the Services to segment or piecemeal the analysis of federal agency actions, in three respects. First, the regulations would require consultation on only those effects that do not meet the consultation exemption criteria of proposed section 403.03(b). Proposed 50 C.F.R. § 402.03(c). Second, the federal action agency may terminate consultation as to “a number of similar actions, an agency program, or a segment of a comprehensive plan” if the agency determines, with the Service’s concurrence, that the activity is not likely to adversely affect any listed species or critical habitat. Proposed 50 C.F.R. § 402.13(a). Third, the proposed rules would only require consultation as to those project effects which meet the new, limited definitions of “effects” and “cumulative effects.” Proposed 50 C.F.R. § 402.02.

Federal action agencies thus could attempt to break large projects up into their component parts, each with supposedly “marginal” effects on listed species and critical habitat, in an effort to minimize the need to fully examine and mitigate for the effects of their actions on listed species and critical habitat. 73 FR 47870. Indeed, the example discussed in the Federal Register notice appears to suggest that segmentation of the analysis of a project’s effects would be entirely appropriate under the new rules. See *id.* (explaining why certain effects of a proposed pipeline would not need to be evaluated). This is yet another potentially significant impact of the regulations that must be evaluated in an EIS.

C. The EA Fails to Analyze Any Cumulative Impacts of the Proposed Rules

One of the most glaring additional flaws in the EA is that it does not contain any analysis of cumulative impacts. An agency may not limit its analysis to the impacts of the project, viewed in isolation. NEPA requires agencies to evaluate whether an action's impacts, though individually limited, are cumulatively significant. 40 C.F.R. §§ 1508.27(b)(7). A cumulative impact is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Where it is reasonable to anticipate a cumulatively significant impact on the environment, an agency must prepare an EIS to examine that impact. 40 C.F.R. §§ 1508.27(b)(7); *Blue Mts. Biodiversity Project*, 161 F.3d at 1212.

Here, it is reasonable to anticipate that the proposed rules will have a significant cumulative impact, for several reasons. First, the rules would eliminate consideration of greenhouse gas emissions and other types of project effects from the section 7 consultation process. Second, by eliminating or truncating the section 7 consultation process for many federal actions, and significantly reducing the degree of scientific oversight, analysis and mitigation in that process, the proposed rules are likely to have significant cumulative impacts on most listed species and designated critical habitats.

While the EA recognizes that NEPA's requirement to analyze cumulative impacts is broader than the ESA's "cumulative effects" requirement, EA at 15, the EA's cumulative impacts discussion inexplicably ends without any analysis. "This conclusory presentation does not offer any more than the kind of general statements about possible effects and some risk which we have held to be insufficient to constitute a hard look." *ONRC v. BLM*, 470 F.3d at 823; *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-896 (9th Cir. 2002) (EA held deficient for failing to include a cumulative impact analysis). Indeed, "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008) (holding EA's cumulative climate change analysis inadequate and remanding to the agency to address this deficiency). "[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of the agency's control does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming." *Id.*, emphasis in original, internal ellipses, citations and quotation marks omitted. The EA therefore, fails to comply with NEPA.

D. The EA Fails to Analyze a Reasonable Range of Alternatives

Finally, the EA is inadequate because it fails to “rigorously explore and objectively evaluate all reasonable alternatives.” *Ctr. for Biological Diversity*, 538 F.3d at 1217, quoting 40 C.F.R. § 1502.14(a). “Although an agency’s obligation to consider alternatives under an EA is a lesser one than under an EIS, NEPA requires that alternatives be given full and meaningful consideration, whether the agency prepares an EA or EIS.” *Id.*, internal quotation marks and citations omitted. As in *Center for Biological Diversity*, the EA here considers an unreasonably narrow range of alternatives to the proposed regulations. *Id.* at 1218. The EA considers only the proposed action and no action alternatives, and one additional regulatory alternative “with an additional role by the Services.” EA at 5-6, 10. This is two fewer alternatives than analyzed in the EA invalidated in the *Center for Biological Diversity* case. The EA thus is invalid for this additional reason as well.

II. Conclusion

Despite the Department’s contentions and protestations that the proposed regulations are modest in breadth, scope, and impact, in fact, they could have profound impact on the species and habitat that the ESA is designed to protect. We have identified a few of those potential impacts in our comments. The proposed regulations and their potential impacts, as reflected in the huge public response, even in the short time frame for public comment provided by the Department, are of great public interest and are highly controversial. The large array of potentially significant environmental impacts resulting from implementation of the proposed regulations along with the substantial public controversy require a full EIS. NEPA mandates no less.

Thank you for your consideration of these comments.

Sincerely,

/S/

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